84-690

No.

In the Supreme Court of the United States

OCTOBER TERM, 1984

UNITED STATES OF AMERICA, PETITIONER

v.

ROBERT PAUL GAGNON, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether respondents' rights to be present at trial under the Constitution or Fed. R. Crim. P. 43 were violated by the trial court's in chambers interview of a juror, in the presence of defense counsel, where respondents neither requested to attend the interview personally nor objected to the proceeding or its outcome.

2. Whether an error of this sort (if it was error) may be presumed to be so prejudicial to the defense that it constitutes reversible error even in the absence of an objection at trial or any concrete demonstration of prejudice.

PARTIES TO THE PROCEEDING

In addition to the parties shown in the caption, Pedro Valenzuela, Donald P. Storms, and Glenn E. Martin were appellants below and are respondents herein.

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The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINION BELOW

The opinion of the court of appeals (App., *infra*, 1a-15a) is reported at 721 F.2d 672.

JURISDICTION

The judgment of the court of appeals was entered on December 8, 1983. A petition for rehearing was denied on August 29, 1984 (App., *infra*, 16a-17a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

RULES INVOLVED

Rules 43 and 52 of the Federal Rules of Criminal Procedure are set out at App., *infra*, 23a-24a.

STATEMENT

Following a jury trial in the United States District Court for the District of Arizona, respondents were convicted on all counts with which they were charged: one count of conspiracy to possess cocaine with intent to distribute it, in violation of 21 U.S.C. 846, and various counts of possession of cocaine with intent to distribute it, in violation of 21 U.S.C. 841.[1] Respondent Gagnon was sentenced to concurrent five-year terms of imprisonment to be followed by a five-year special parole term. Respondent Valenzuela was sentenced to concurrent 18-month terms of imprisonment to be followed by a three-year special parole term. Respondent Storms was sentenced to concurrent ten-year terms of imprisonment to be followed by concurrent five-year special parole terms; he was also fined $10,000. Respondent Martin was sentenced to a four-year term of imprisonment and fined $2000 on the conspiracy count; the sentences on his two possession convictions were suspended in favor of a five-year term of probation to run consecutively to the terms of incarceration.[2] The court of appeals reversed all convictions. App., *infra*, 1a-15a.

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[1] Of the eight possession counts with which they were variously charged, respondents were convicted as follows: Gagnon on one count (Count 3); Valenzuela on one count (Count 13); Storms on seven counts (Counts 3, 4, 5, 8, 11, 12, and 13); and Martin on two counts (Counts 2 and 3).

[2] Nine others were indicted with respondents. Alvaro Becerra, Timothy Pohlschneider, Gentry Neal, and John Cates pleaded guilty. The charges against Kevin Hynes, David Linquist, and Keith Mors were dismissed on the government's motion, and Hynes and Linquist testified for the government at trial. Donald Tore Jensen and Wes Lundy are fugitives. Jeffrey Tietzer pleaded guilty to a separate indictment and testified for the government at trial.

1. The evidence at trial showed that from October 1979 through October 1980, respondents were part of a large-scale cocaine distribution scheme centered in Tucson, Arizona. In broad outline, the scheme operated as follows: Jeffrey Tietzer, the hub of the conspiracy in Tucson, traveled frequently to Florida, where he obtained cocaine from Alvaro Becerra. He then sold the cocaine through several distributors in Tucson, who in turn had their own customers. Respondents Martin and Gagnon were two of Tietzer's distributors, but as the scheme progressed, respondent Storms became Tietzer's principal distributor.

In October 1979, Tietzer was introduced to Becerra and informed that Becerra could provide large quantities of cocaine (Tr. 84-85). For a down payment of approximately $4500, Becerra provided Tietzer with a half kilo of cocaine (Tr. 86).[3] After he returned to Tucson, Tietzer showed the cocaine to respondent Gagnon. Gagnon examined the cocaine with a microscope and, satisfied with its quality, agreed to find buyers for it. Tr. 87.

Subsequently, Gagnon introduced Tietzer to Donald Tore Jensen.[4] Using a "hot box" (a device for testing the quality of cocaine by determining the tempera-

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[3] One kilo equals 2.2 pounds.

[4] Respondent Gagnon, who claimed an alibi, was the only defendant to testify at trial. Although he denied any narcotics transactions with Tietzer, he admitted that he owned a type of microscope (stereoscope) and that he had introduced Tietzer to Jensen (Tr. 709, 714).

ture at which it melts), Jensen tested the quality of the cocaine and then agreed to sell it. Tr. 89-90. Jensen in turn introduced Tietzer to other buyers, respondent Martin and Wes Lundy. Tietzer supplied Martin and Lundy with cocaine on consignment, and the next day they paid him $14,000 from their sale proceeds. Tr. 91-94. Tietzer gave respondent Gagnon and Jensen each one ounce of cocaine in payment for introducing him to the buyers (Tr. 93).[5]

In November, respondent Gagnon contacted Tietzer and said that he had Phoenix buyers who wanted to buy five kilos of cocaine (Tr. 100, 103, 104-105). Tietzer notified Becerra, who personally delivered three kilos of cocaine to Tucson (Tr. 105-106, 107; CR 212).[6] When Gagnon's buyers did not appear, the conspirators contacted Jensen, who called respondent Martin and Lundy. Martin arrived with $10,000. Tr. 110-111. Then, because Martin and Lundy had sold only a half kilo and the conspirators still had a substantial quantity of cocaine to sell, Jensen contacted respondent Storms. After testing a sample of the cocaine, Storms paid Tietzer, Becerra, and Jensen $29,500 for about a half kilo. Tr. 111-114.[7]

The next day, respondent Storms telephoned to report that he had buyers arriving from Seattle with money to purchase a half kilo of cocaine. Storms, Becerra, and Tietzer met at the Tucson airport. Storms met the buyers' plane and brought them to the airport parking lot, where they paid about $26,000 for a half kilo of cocaine. Tietzer and re-

[5] These events in October 1979 form the basis for Count 2.

[6] "CR" refers to the district court clerk's record of exhibits.

[7] These events form the basis for the charge against respondent Martin in Count 3 and respondent Storms in Count 4.

spondent Storms received six ounces of cocaine as their payment, and Storms sold it for them. Tr. 115-117.[8]

During the next several months, some 10 one-kilo shipments of cocaine were made from Becerra in Florida through Tietzer to respondent Storms for sale. Tietzer delivered Becerra's payments personally or transmitted them by air transport disguised as printed matter. Tr. 117-119, 122, 124-128.

Two more transactions occurred at the end of May 1980. On May 29, Tietzer sold Storms two kilos of cocaine he had brought from Miami. Tr. 151-152. When Storms made partial payment of $105,000 the next day, he told Tietzer he needed three more kilos. Tietzer immediately flew to Florida for the cocaine and returned, accompanied by Becerra. Storms later paid $180,000 for the shipment. Tr. 153-155, 157-158; CR 401-406.[9]

The last two sales occurred in July 1980. Tietzer brought a kilo of cocaine to Tucson, gave it to Storms for sale, and transmitted about $60,000 to Becerra by an air express package service (Tr. 159-161).[10] Shortly afterward, on behalf of Becerra (his brother-in-law) respondent Valenzuela delivered three kilos of cocaine to Storms. For this shipment, Becerra received $175,000 in three installments, one of which Valenzuela delivered on the return trip. Tr. 162-166.[11]

2. During the first day of this five-day trial, one of the jurors, Garold Graham, observed respondent

[8] These events form the basis for Count 5.

[9] The May 29 transaction formed the basis for Count 8, and the May 30 transaction formed the basis for Count 11.

[10] This transaction formed the basis for Count 12.

[11] This transaction formed the basis for Count 13.

Gagnon sketching portraits of members of the jury. He became concerned and informed the bailiff, who then informed the trial judge. Out of the presence of the jury (see Tr. 177), the court told Gagnon and his attorney that it was "very improper for a defendant to draw pictures of a jury while they're sitting in the box" and confiscated the sketches. App., *infra*, 18a; Tr. 188.

Respondent Gagnon's attorney requested the court to interview juror Graham to determine whether his concern over the incident might "be in the nature of prejudice against Mr. Gagnon." App., *infra*, 19a; Tr. 188-189.[12] The trial judge agreed. In open court (though still out of the presence of the jury), she announced (App., *infra*, 19a; Tr. 189): "I will talk to the juror in my chambers, and make a determination. We'll stand at recess." The transcript reveals that respondents and their counsel were present in the courtroom at that time (Tr. 100).

A transcript of the in-chambers conference, which is reprinted in full at App., *infra*, 19a-22a, was prepared and made available to all parties. App., *infra*, 5a. Respondent Gagnon's attorney was present and participated in questioning the juror. None of the other attorneys for the defendants or the government requested to be present or attended; nor did any of the defendants request to be personally present.[13]

At the conference, the trial judge explained to juror Graham that Gagnon is an "artist" and that

[12] None of the other defendants expressed concern over the incident.

[13] At oral argument in the court of appeals, Gagnon's attorney stated that he had been invited to the conference through a note from the judge delivered by the bailiff. App., *infra*, 10a n.1.

the sketching was "just one of those things that happened. The Court has stopped it. It won't continue." App., *infra*, 20a; Tr. 189-190. She then asked the juror whether the incident would "affect you in any way." App., *infra*, 20a; Tr. 190. The juror responded (*ibid.*):

> As far as any judgment on what's going on, it doesn't affect me. I just thought that perhaps because of the seriousness of the trial, and because of—whichever way the deliberations go, it kind of—it upset me, because—of what could happen afterwards.

The judge then inquired whether "it upset you to the extent that you couldn't judge Mr. Gagnon fairly." The juror responded, "No." The judge pursued the matter, and juror Graham repeatedly avowed that he could be fair to everyone concerned. *Ibid.*

Graham informed the judge and defense counsel that one other juror had mentioned that he had noticed Gagnon's sketching, but that this juror "didn't know what it was." App., *infra*, 20a; Tr. 191. No other jurors had mentioned observing the incident. App., *infra*, 21a; Tr. 191.

At this juncture, the trial judge asked Gagnon's attorney whether he was "satisf[ied]" with the results of the interview. The attorney posed two questions to juror Graham: whether his conversation with the bailiff had taken place in front of other jurors, and whether the incident would "prejudice you in any way against Mr. Gagnon." Graham assured the attorney that the conversation with the bailiff was in the hallway, away from the other jurors, and that he would not be prejudiced against Gagnon. App., *infra*, 21a; Tr. 191-192.

On the basis of this interview, the trial judge concluded not to dismiss the juror; she instructed him not to discuss anything about the matter with the other jurors. She then asked defense counsel whether the outcome of the conference was "agreeable with you." App., *infra*, 21a-22a; Tr. 192. Gagnon's attorney replied, "Yes," and the conference was completed. *Ibid.* Neither then nor at any other time did any of the attorneys for respondents move to disqualify juror Graham or the other juror who witnessed the sketching. Nor was any objection made to conducting the conference in the absence of the defendants.

3. The court of appeals reversed the convictions on the ground (App., *infra*, 6a-7a) that respondents' right "to be present during communications between the judge and the jury," grounded in the Constitution, principles of jury trial, and Fed. R. Crim. P. 43, was violated by the conference with juror Graham. The court held that respondents had not waived their right to be present at the conference by their failure to ask to attend. Insofar as that right is constitutionally based, the court held that the standard for waiver is the "intentional relinquishment or abandonment of a known right or privilege" test of *Johnson* v. *Zerbst*, 304 U.S. 458, 464 (1938)—a standard the court held was not satisfied here. App., *infra*, 11a.

The court of appeals rejected the government's argument that respondents, having failed to object to the conference at trial, could not raise the issue on appeal. Although invoking the "plain error" exception of Fed. R. Crim. P. 52(b), the court made no finding that the procedure followed by the trial court had "affect[ed] substantial rights" of the accused, as Fed. R. Crim. P. 52(b) requires. It concluded instead that "[a] criminal defendant's right to be present at every stage of his trial is so fundamental that, in certain circumstances, its violation must be noticed by a reviewing court regardless of a failure to raise the issue below." App., *infra*, 11a n.2 (citing *Rogers* v. *United States*, 422 U.S. 35, 41 (1975)).

Finally, the court of appeals found that the infringement of respondents' personal right to be present at the conference was not harmless beyond a reasonable doubt, on the ground that "[t]he presence of the defendants was necessary in order to safeguard another constitutional right—the right to an impartial jury" (App., *infra*, 13a). While "unable to say on this record that the right to an impartial jury was infringed," the court found that it could not "say with assurance that the absence was harmless." *Id.* at 13a-14a.

Judge Skopil dissented (App., *infra*, 14a-15a). He would have held that respondents' interests were adequately represented by Gagnon's counsel, and that the conference with the juror thus constituted harmless error. "It is difficult to conceive of any value from the presence of defendants and the remaining defense attorneys. Their questions would have been mere surplusage to those posed by [Gagnon's attorney] and the court." *Ibid.* Indeed, Judge Skopil stated, "[t]he added presence of the defendants and their counsel would have been * * * quite possibly detrimental to their interest." *Id.* at 15a.

REASONS FOR GRANTING THE PETITION

This Court and the courts of appeals have frequently been called upon to address the consequences of communications between trial judge and juror out-

side the presence of the defendant.[14] This is because such communications, formal or informal, are common and often unavoidable. As this Court recently noted, "[t]here is scarcely a lengthy trial in which one or more jurors does not have occasion to speak to the trial judge about something, whether it relates to a matter of personal comfort or to some aspect of the trial." *Rushen* v. *Spain*, No. 82-2083 (Dec. 12, 1983), slip op. 4. It is important that rules of appellate review in this area accommodate the exigencies of trial practice as well as protect the substantial rights of the accused. An approach to these issues that "ignores the[] day-to-day realities of courtroom life" will, as this Court observed, "undermine[] society's interest in the administration of criminal justice." *Id.* at 4-5.

This case involves a particularly innocuous form of conference between judge and juror—one in which defense counsel actively participates and the conference is transcribed for the record. The contrast between the reasonableness of the procedure and the sweeping and unrealistic terms of the decision below is, therefore, striking. The court of appeals held that *any* communication between judge and juror in the absence of the defendant—even if defense counsel is present and participates—is in violation of Fed. R.

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[14] See, *e.g.*, *Rushen* v. *Spain*, No. 82-2083 (Dec. 12, 1983); *Rogers* v. *United States*, 422 U.S. 35 (1975); *United States* v. *Betancourt*, 734 F.2d 750 (11th Cir. 1984); *United States* v. *Silverstein*, 732 F.2d 1338 (7th Cir. 1984), petitions for cert. pending, Nos. 84-5492 and 84-5500; *United States* v. *Head*, 697 F.2d 1200 (4th Cir. 1982), cert. denied, No. 82-1655 (June 20, 1983); *United States* v. *Ronder*, 639 F.2d 931 (2d Cir. 1981); *Henderson* v. *Lane*, 613 F.2d 175 (7th Cir.), cert. denied, 446 U.S. 986 (1980); *Nevels* v. *Parratt*, 596 F.2d 344 (8th Cir. 1979).

Crim. P. 43 and the Constitution unless the defendant has, in advance, specifically indicated his "willingness to be absent" (App., *infra*, 10a); the court also held that the potential effects of such a communication are inherently so serious that an appellate court is required to reverse even when the defendant failed to lodge an objection at trial and there is no finding of specific prejudice to the defense.

The decision below is in conflict with decisions of this Court and numerous courts of appeals. It establishes so capricious a standard as to invite—even require—needless reversals in scores of criminal cases where defense counsel (but not the defendant) has fully participated in all phases of trial, where the defendant has neither requested to be present at nor objected to the results of conferences between judge and juror, and where there is no conceivable prejudicial impact on the outcome of the trial. It has distorted the requirements of Fed. R. Crim. P. 43 and the Constitution and has virtually eliminated the requirement for a timely objection. We submit that the decision warrants review by this Court.

1. a. In *Rushen* v. *Spain*, *supra*, this Court left open the question whether a criminal defendant's constitutional right to be present at trial was violated when the trial court, with no notice to counsel and in the absence of both counsel and defendant, questioned a juror about the possibility of prejudice. Slip op. 3-4 n.2. In a concurring opinion, Justice Stevens commented (slip op. 4):

> I think it quite clear that the mere occurrence of an *ex parte* conversation between a trial judge and a juror does not constitute a deprivation of any constitutional right. The defense has no constitutional right to be present at every interac-

> tion between a judge and a juror, nor is there a constitutional right to have a court reporter transcribe every such communication.

This case presents the question whether an in-chambers conference between trial judge and juror on the possibility of prejudice, conducted on the record and with full participation by defense counsel, violates a defendant's constitutional rights. We submit it does not. It also presents the parallel question under Fed. R. Crim. P. 43.

As the court of appeals recognized (App., *infra*, 5a-6a), the right to be present at trial has two sources in the Constitution, the Confrontation Clause and the Due Process Clause. The former obviously has no application to this case since a conference between judge and juror does not implicate the defendant's right "to be confronted with the witnesses against him." U.S. Const. Amend. VI; *Snyder* v. *Massachusetts*, 291 U.S. 97, 107 (1934); see *Rushen* v. *Spain*, slip op. 8 n.8 (Stevens, J., concurring); *Polizzi* v. *United States*, 550 F.2d 1133, 1138 (9th Cir. 1976).

The due process right to be present is more complicated. As the court of appeals recognized (App., *infra*, 7a), the right "is not absolute." This Court formulated the right in *Snyder*, 291 U.S. at 105-106, as follows: "the defendant has the privilege under the Fourteenth Amendment to be present in his own person whenever his presence has a relation, reasonably substantial, to the fulness of his opportunity to defend against the charge." In other words, the Due Process Clause does not "assure[] the privilege of presence when presence would be useless, or the benefit but a shadow." *Id.* at 106-107. See also *Faretta* v. *California*, 422 U.S. 806, 819 n.15 (1975) (the

accused "has a right to be present at all stages of the trial where his absence might frustrate the fairness of the proceedings"); *Rushen* v. *Spain*, slip op. 8 n.8 (Stevens, J., concurring) ("we have viewed a potential for prejudice as a necessary element of a violation of the right to be present").

Here, the conference with the juror was conducted at the request of respondent Gagnon's attorney, in his presence, with his active participation, and to his full satisfaction. There is no reason to suppose that Gagnon's presence would have contributed to the interview—and indeed every reason why competent counsel would advise a client against participating in such a conference.

Only a trained attorney could be expected to be able to evaluate the trial court's questions to the juror and the juror's responses in light of legal standards governing juror bias. Only a trained attorney would be in a position to propound additional questions to the juror (as Gagnon's attorney found necessary here). Gagnon could have contributed little, if anything, to this process. And even if Gagnon were dissatisfied with the conduct of the conference, he had access to transcripts and could have proposed additional questions or requested dismissal of the juror at a later time if he were so inclined. Cf. *Snyder*, 291 U.S. at 112-113.

Indeed, Gagnon's presence at the conference would have been worse than useless. The very purpose of interviewing the juror was to determine whether the effect on him of seeing Gagnon making a sketch of the jurors would undermine his fairness and impartiality. What could be more inhibiting—more likely to stifle candid responses—than the presence of Gagnon himself at the conference? The apparent basis for concern about the juror's impartiality was that

the juror might fear that Gagnon could identify, and thus retaliate against, the juror after the trial (App., *infra*, 8a). It is unlikely that the juror, if he entertained such fears, would express them frankly if Gagnon were sitting there.

The court of appeals' sole suggestion as to why Gagnon's presence at the juror interview might have been useful is, as another court said in similar circumstances, "fancifully remote." *Ware* v. *United States*, 376 F.2d 717, 718 (7th Cir. 1967). Pointing out that juror Graham had indicated that another juror had noticed Gagnon's sketching activity, the court stated (App., *infra*, 9a):

> Had Gagnon been present, he could have gauged the possibility of whether, given the distance and angle of the second juror's seating relative to himself, that second juror might have seen or guessed the subject of the pencil sketches.

However, any calculations of this sort could as easily have been performed by Gagnon's attorney as by Gagnon himself.[15] More importantly, if there had been any serious concern about the second juror, the more logical course would have been to request an interview with him. That neither trial court nor defense counsel considered it necessary or desirable to question the second juror strongly suggests that the matter was of little importance. Further, there is little connection between Gagnon's hypothetical calculations and his presence at the conference. Transcripts of

[15] Interestingly, much of the activity undertaken by counsel and the jurors in the absence of the defendants in *Snyder* consisted of evaluating distances and angles at the scene of the crime. 291 U.S. at 103-104. It apparently did not occur to this Court that such calculations might be better performed by the defendants personally.

the conference were made available to all of the parties; had Gagnon thought it useful to make calculations on the basis of juror Graham's answers, or to inquire further about the second juror, he was free to do so. He was not handicapped by his absence. See *Snyder*, 291 U.S. at 109.

Any advantage to Gagnon's co-defendants, respondents Valenzuela, Storms, and Martin, of personally attending the juror interview is even more farfetched. Only Gagnon had engaged in sketching the jurors; the other defendants were not involved. It is clear from defense counsel's own words (App., *infra*, 19a; Tr. 188-189) that the only purpose of the juror interview was to investigate possible bias against respondent Gagnon. It is therefore not surprising that only Gagnon's counsel attended the conference. In any event, the presence of Gagnon's counsel sufficed to protect the interests of the other respondents, which were plainly not at all different from—but only a more attenuated form of—those of Gagnon. See *United States* v. *Ford*, 632 F.2d 1354, 1379 (9th Cir. 1980), cert. denied, 449 U.S. 961 (1981).[16]

Under the court of appeals' hypersensitive approach to potential prejudice, it is difficult to see how the right of presence could ever be thought to be "useless, or the benefit but a shadow." *Snyder* v. *Massachusetts*, 291 U.S. at 106-107. It is tantamount to a per se rule. The court of appeals' approach thus conflicts with that taken by this Court. This Court

[16] The court of appeals suggested (App., *infra*, 8a) that the prejudice against Gagnon "may be extended to the [other defendants]," in light of the vicarious liability of co-conspirators. However, in this prosecution, each of the defendants was charged and convicted only in connection with criminal activity in which the government proved he took a direct part. See pages 3-5, *supra*. There was no *Pinkerton* charge.

has not found a due process violation in this context merely because a possibility of benefit to the defendant from presence at a trial proceeding, however slim, can be hypothesized. Indeed, in *Snyder*, the Court acknowledged that, if the defendant had been present when the jury viewed the scene of the crime, he might have been able to give valuable "suggestion or advice" to his attorney about matters the attorney should call to the jurors' attention. 291 U.S. at 113. That hypothetical possibility, however, was not enough to support a finding of a due process violation. The question is whether there is a "reasonably substantial" relation, on the facts of the case, between the right to be present and the ability to obtain a fair trial. *Id.* at 106. The relation here is far from substantial; indeed, the potential for prejudice to respondents here is more remote even than that in *Snyder*.

The analysis under Rule 43 presents a similar question. The language of the Rule, if taken literally, might be understood to require the trial court to permit the defendant to be present during any communications with a juror (except those explicitly exempted by the Rule), even when the defendant's presence would impair the court's ability to guarantee a fair trial to all parties. Such an extreme interpretation, however, finds no support in the advisory committee notes to the Rule or in precedents interpreting it. Where the court determines that a conference with a witness or juror must be conducted outside the presence of the defendant in order to obtain frank responses to serious questions, Rule 43 does not prevent it. Cf. *LaChappelle* v. *Moran*, 699 F.2d 560, 565 (1st Cir. 1983).[17] Thus, even though the scope of

[17] *LaChappelle* is a compelling illustration of this point. There, the trial judge held a private discussion, on the record, with a 16-year-old complaining witness in a rape prosecution against her father, concerning her embarrassment over describing her father's sexual climax during the incident. In open court, the witness had been so embarrassed that she refused to answer defense counsel's questions. The defendant requested to be present at the conference, but his request was denied and his objection overruled. Although *LaChappelle* arose on habeas corpus review of a state court conviction, and the constitutional standard thus applied, it is difficult to believe that Rule 43 would have required the witness's father to be permitted to attend had the prosecution been in federal court. See also *United States* v. *Howell*, 514 F.2d 710, 714 (5th Cir.), cert. denied, 423 U.S. 914 (1975) (defendant properly excluded from interview with juror who had been offered a bribe, and from subsequent discussion with counsel); *United States* v. *Ruiz-Estrella*, 481 F.2d 723 (2d Cir. 1973) (defendant properly excluded from portion of suppression hearing dealing with secret profile).

Rule 43 may be somewhat "broader" than the due process right to be present, as the court of appeals held (App., *infra*, 9a), the court nonetheless erred in finding a violation of Rule 43 here.[18] Not only was there no substantial prejudice to respondents' rights, but, we submit, the trial court would have been fully justified in denying a request by respondents to attend the conference, had it been made.

[18] The pertinent difference between Rule 43 and the constitutional right to be present at conferences between judge and juror is that the defendant may invoke the latter only when his presence would be useful to his defense, while the former creates a strong presumption in favor of the defendant's presence. Neither Rule 43 nor the Constitution guarantees the defendant's right to be present where other legitimate interests would be infringed. The court of appeals failed to recognize any limits on the Rule 43 right whatsoever, and thus erroneously reversed these convictions and set a damaging precedent for future cases.

b. Even assuming that respondents would have had a right, upon request, to attend the juror conference, there remains the question whether their failure to assert that right constituted a waiver. The court of appeals' answer to that question conflicts with decisions of this Court and other courts of appeals and with the terms of Rule 43.

The court of appeals held (App., *infra*, 11a) that the standard for waiver of the right to be present is that enunciated in *Johnson* v. *Zerbst*, 304 U.S. 458, 464 (1938) ("intentional relinquishment or abandonment of a known right or privilege"). Since there was no evidence in the record directly establishing that respondents had made a conscious, informed decision to absent themselves from the juror conference, the court of appeals could not "conclude that they knowingly and intelligently waived their constitutional right to be present" (App., *infra*, 11a).

We note initially that this analysis depends for its validity on the premise, shown to be erroneous in the preceding discussion, that any right the respondents had to attend the conference was constitutionally based. But even were that premise correct, the wrong waiver standard was employed by the court of appeals. Indeed, its holding is in direct conflict with *Taylor* v. *United States*, 414 U.S. 17, 19-20 (1973). There, the Court held that the *Johnson* v. *Zerbst* standard is inapplicable to a defendant's waiver of the right to be present at trial, even for portions as critical as the taking of evidence. The voluntary absence of the defendant from the proceeding, without more, constitutes a valid waiver.

There are sound reasons not to apply the *Johnson* v. *Zerbst* standard in situations of this kind. The benefit of some rights (the right to be present among

them) may be realized as well by waiving them as by asserting them. The question before Gagnon and his attorney was not whether Gagnon should "relinquish" or "abandon" a valuable constitutional right, but whether it was more in Gagnon's interest to be absent from or present at the juror interview. "Under our adversary system, once a defendant has the assistance of counsel the vast array of trial decisions, strategic and tactical, * * * rests with the accused and his attorney." *Estelle* v. *Williams*, 425 U.S. 501, 512 (1976).

Estelle v. *Williams* presents a close analogy to this case. There, the Court considered whether a criminal defendant who does not ask to wear civilian clothes is denied due process of law by trial in prison garb. Observing that "it is not an uncommon defense tactic to produce the defendant in jail clothes in the hope of eliciting sympathy from the jury" (425 U.S. at 508), the Court held that a defendant is required to object to being tried in jail garments (*ibid.*). The Court expressly rejected the notion that a "strategic and tactical" decision of this sort, made by a defendant advised by competent counsel, is to be measured against the *Johnson* v. *Zerbst* standard for intentional relinquishment of a constitutional right. 425 U.S. at 508 n.3. Accordingly, the Court reasoned, the trial judge is not required to "ask[] the [defendant] or his counsel whether he was deliberately going to trial in jail clothes." The failure to make an objection, for whatever reason, is "sufficient to negate the presence of compulsion necessary to establish a constitutional violation." *Id.* at 512-513.

The answer here follows *a fortiori* from *Estelle*. No less clearly "strategic and tactical" than the decision to stand trial in prison garb is the defendant's

decision not to attend a juror conference. See *Polizzi* v. *United States*, 550 F.2d at 1137. As noted at pages 13-14, *supra*, there are persuasive (often compelling) reasons why a criminal defendant would prefer to be absent rather than to chill the juror's willingness to answer candidly. A defendant's failure to invoke the right to attend, or to object to the proceeding, is therefore sufficient to establish that his absence was voluntary.[19]

The analysis is unchanged when the focus shifts to Rule 43. Rule 43(a) provides that "[t]he defendant shall be present at * * * every stage of the trial * * * except as otherwise provided by this rule." Rule 43(b) provides that "the defendant shall be considered to have waived his right to be present whenever a defendant, initially present, (1) voluntarily absents himself after the trial has commenced * * *." Here, respondents plainly waived their right to be present when they did not attend, and made no request to attend, the juror interview.

The court of appeals rejected the government's argument that respondents had waived their Rule 43 right to be present, on the ground that there was no indication in the record "of whether Gagnon or the other defendants expressly or impliedly indicated their willingness to be absent from the conference" (App., *infra*, 10a).[20] On this issue, the court declared

[19] As in *Estelle*, 425 U.S. at 512 n.9, it is irrelevant whether the decision not to attend the conference was "a defense tactic or simply indifference. In either case, respondent's silence precludes any suggestion of compulsion."

[20] The court of appeals apparently thought that this standard is less "stringent" than the *Johnson* v. *Zerbst* standard it applied to the constitutional right to be present at trial. App., *infra*, 11a. However, as this Court observed in *Estelle*, 425 U.S. at 512, to require the trial court to make inquiries regarding the voluntariness of an act would be equivalent to imposing the *Johnson* v. *Zerbst* standard. In any event, this Court has applied the same analysis to waiver of the right to be present at trial under both Rule 43 and the Constitution, without distinction. Failure by a criminal defendant, represented by competent counsel, to invoke his right to be present at a conference between judge and juror constitutes a valid waiver.

it irrelevant that none of the defendants asked to attend.[21] The holding below is thus contrary to the plain language of Rule 43 and to decisions of this Court.

By its terms, Rule 43(b) provides that a defendant "shall be *considered to have waived* his right to be present" (emphasis added) if he "voluntarily absents himself after the trial has commenced." Deeds are all; there is no additional requirement that the defendant express or imply anything about his "willingness to be absent." Nor is the trial court required to address specific inquiries to the defendant to ensure that he was aware of, and voluntarily waiving, his right. On these matters, as with the vast majority of questions that arise during trial, our system relies on counsel to assert the defendant's rights where appropriate.[22]

Accordingly, most courts of appeals to consider the issue have concluded that a defendant waives his right to attend a conference at the bench or in chambers if he does not object or request to attend. See,

[21] The court stated that respondents' failure to object was relevant to the question of prejudice, but not to the question of voluntary absence, or waiver. App., *infra*, 10a-11a.

[22] The advisory committee notes to Rule 43 confirm this analysis. The notes state that "voluntary absence may constitute a waiver even if the defendant has not been informed by the court of his [right] to remain during the trial."

e.g., *United States* v. *Washington*, 705 F.2d 489, 497 (D.C. Cir. 1983); *United States* v. *Provenzano*, 620 F.2d 985, 998 (3d Cir.), cert. denied, 449 U.S. 899 (1980); *United States* v. *Bufalino*, 576 F.2d 446, 451 (2d Cir.), cert. denied, 439 U.S. 928 (1978); *United States* v. *Brown*, 571 F.2d 980, 987 (6th Cir. 1978). This conflict among the circuits should be resolved.

2. Not only did respondents make no attempt to attend the juror interview; they also made no objection to the proceeding when it occurred or at any point during the trial. Accordingly, even assuming that respondents' rights under Rule 43 or the Constitution were in fact violated under the circumstances of this case, the court of appeals was not justified in reversing on that basis.[23] *United States* v.

[23] It seems clear that the contemporaneous objection requirement applies to a supposed infringement of the right to be present at trial. Had the error been called to the attention of the trial judge before the end of trial, he could have cured any possible prejudice by substituting the alternate jurors for the two jurors who observed respondent Gagnon sketching. The obligation to afford the trial court an opportunity to remedy an error at trial is the principal basis for the contemporaneous objection requirement. *Estelle* v. *Williams*, 425 U.S. at 508 n.3.

But even assuming defendants were under no obligation to object in order to preserve this issue for appeal, no reversible error resulted from the juror interview. A denial of the right to be present at trial does not warrant reversal of a conviction unless it resulted in prejudice to the defense. *Rushen* v. *Spain*, *supra*. We believe that the court of appeals was clearly incorrect in its conclusion (App., *infra*, 13a-14a) that respondents' absence from the juror interview was not harmless error. Indeed, we believe their absence enhanced their ability to secure a fair trial before an impartial jury. See pages 13-14, *supra*. In this connection, we would note that the court's application (App., *infra*, 13a) of the constitutional harmless error standard to what we have shown above was at most a violation of Rule 43 (see pages 16-17, *supra*) was in error.

Frady, 456 U.S. 152, 163 & nn.13-14 (1982); *Estelle* v. *Williams*, 425 U.S. at 508-509 & n.3; see Br. for the United States at 26-35, in *United States* v. *Young*, No. 83-469 (argued Oct. 2, 1984).[24] Cf. Fed. R. Crim. P. 30.

The court below held, however, that the error could be noticed under the "plain error" exception of Fed. R. Crim. P. 52(b) even though it had not been brought to the attention of the trial court. But the court did not make the finding of substantial prejudice, or "miscarriage of justice," necessary to justify reversal under Rule 52(b). See *Frady*, 456 U.S. at 163 & nn.13-14. The court of appeals held that "[a] criminal defendant's right to be present at every stage of his trial is so fundamental that, in certain circumstances, its violation must be noticed by a reviewing court regardless of a failure to raise the issue below" (App., *infra*, 11a n.2). By this, the court apparently meant that the right to be present is so fundamental that *in all circumstances* its violation must be noticed by the appellate court.[25] That holding is plainly wrong, and is in direct conflict with

[24] Copies of our brief in *Young* have been provided to counsel for respondents.

[25] We can agree that, "in certain circumstances" (App., *infra*, 11a n.2), the denial of the right to be present might well be so fundamental an error that it should be noticed by an appellate court even in the absence of a timely objection. See, *e.g.*, *Rogers* v. *United States*, 422 U.S. 35, 41 (1975). However, the court of appeals did not, as its statement of the law would suggest, inquire whether in fact there were any circumstances here (*i.e.*, substantial prejudice to the defense) that would warrant a finding of plain error. We therefore interpret the court as holding that no finding of substantial prejudice is required.

Rushen v. *Spain*, *supra*, *Rogers* v. *United States*, 422 U.S. 35 (1975), and numerous decisions by other courts of appeals.[26]

In *Rushen*, this Court "emphatically" held (slip op. 3), in circumstances far more troubling than these, that an infringement on the right to be present during communications between judge and juror may have so little impact on the fairness of the trial that it is harmless error.[27] Put differently, a court of appeals may not *presume*, on the basis of the nature of the right, that the error had sufficient impact to justify reversal of a conviction. Slip op. 3. It follows, *a fortiori*, that an infringement on the right to be

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[26] For an error to be "plain," it must be both *obvious* and substantially *prejudicial*. Although the focus of the discussion to follow is on the court of appeals' failure to make a finding of substantial prejudice, we would also point out that the error (if it was error) was far from obvious. Indeed, our position is that it was not error at all. See pages 12-22, *supra*. Even if this Court disagrees, we would submit that the question of the correctness of the trial court's actions is, at worst, a close one.

[27] Both this case and *Rushen* involve conferences between the trial judge and a juror without the defendant being present. In *Rushen*, however, no defense counsel was present; indeed, the defendants did not even find out about the conference until after trial (slip op. 2). Here, by contrast, the conference was announced in open court and attended by defense counsel. Further, in *Rushen*, no transcript was made of the conference; the defendants or a reviewing court therefore had no reliable means of knowing what transpired. Here, a transcript was prepared and available to all parties. If the error in *Rushen* could be held to be harmless, the error here, if any, could hardly be plain error.

Rushen was decided by this Court four days after the court of appeals rendered the judgment below, but it was forcefully called to the court's attention by the government's unsuccessful petition for rehearing.

present cannot be *presumed* to violate the "substantial rights of the accused" or to be a "miscarriage of justice"—standards significantly more exacting than the harmless error standard.

The court of appeal's abjuration of the "substantial prejudice" analysis under Rule 52(b) also conflicts with *Rogers* v. *United States*, *supra*. There, the Court concluded that a reviewing court could notice an error that included a denial of the right to be present during communications between judge and jury, in the absence of a timely objection, where the error was "fraught with potential prejudice" (422 U.S. at 41).[28] In the absence of a finding of substantial prejudice—or so *Rogers* would indicate—there would be no basis for reaching the issue.

It is difficult to see how the court of appeals could have concluded that there was a miscarriage of justice here, had it engaged in an appropriate "plain error" analysis. As noted, the presence of respondents at the juror interview would have been useless or worse than useless. The court of appeals' own suggestion as to prejudice, as has been shown, was fanciful. And finally, the underlying issue—the impartiality of the jurors who observed respondent Gagnon sketching—was resolved by the trial court, on the basis of an interview with the principal juror in question. The question of juror impartiality is heavily dependent on the trial court's assessment of the sincerity of the juror's answers. There is nothing in the record that would justify an appellate court in overturning the trial court's conclusion that the jury

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[28] In *Rogers*, the trial court, without notifying the defendant or defense counsel, made a misleading written response to a query from the jury. The possibility that the error affected the jury's verdict was substantial.

panel would not be tainted by the sketching incident. See *Rushen* v. *Spain*, slip op. 6. This is especially true since defense counsel expressly agreed with the trial court's decision at trial.

Many courts of appeals, in factual circumstances similar to or worse than these, have concluded that there was no prejudice to the defendant from a denial of his right to be present at every stage of trial. The reasoning, as well as the result, of these decisions is in direct conflict with the decision below.[29] See, *e.g.*, *United States* v. *Brown*, 571 F.2d 980, 987 (6th Cir. 1978) (defendant's absence from conference in chambers regarding dismissal of juror was not prejudicial given defense counsel's presence and the availability of a transcript of the proceeding; furthermore, the issue was waived by failure to object); *Henderson* v. *Lane*, 613 F.2d 175, 179 (7th Cir.), cert. denied, 446 U.S. 986 (1980) (defendant's absence from examination of alternate jurors was harmless because counsel was present, proceeding was on the record, and defendant had been present during original jury selection); *United States* v. *Washington*, 705 F.2d 489, 498 (D.C. Cir. 1983) (defendant's absence from colloquy at bench with potential jurors was harmless because counsel was present and took notes); *Nevels* v. *Parratt*, 596 F.2d 344 (8th Cir. 1979) (defendant's absence from conference with juror concerning possible misconduct was harmless; defense counsel participated in conference, no request for defendant to attend was made, and State had shown that juror in question remained impartial);[30] see also *United States* v. *Walls*, 577 F.2d 690, 697-699 (9th Cir.), cert. denied, 439 U.S. 893 (1978) (defendant's absence from conference with juror harmless because counsel was present, the conference was on record, and no objection was raised). The decision below conflicts even more strikingly with decisions finding the absence of the defendant from a stage of the proceeding harmless even though defense counsel was *not* present. *E.g.*, *United States* v. *Yonn*, 702 F.2d 1341, 1344-1345 (11th Cir. 1983); *United States* v. *Dominguez*, 615 F.2d 1093, 1094-1096 (5th Cir. 1980); *United States* v. *Bufalino*, 576 F.2d 446, 451 (2d Cir.), cert. denied, 439 U.S. 928 (1978).

The conclusion is inescapable that the convictions in this case for serious crimes involving hundreds of thousands of dollars in wholesale narcotics trafficking were needlessly reversed. Moreover, it is apparent that many future convictions could suffer the same fate under the court of appeals' tortured understanding of the right to be present at trial and the defendant's lack of any obligation to assert that right at a

[29] Although the analysis of prejudice in the decisions discussed in text is sometimes under the rubric of "harmless error" rather than "plain error," that fact does not detract from the conflict in the circuits. If an error is so nonprejudicial that it is harmless, it obviously falls short of the stringent "miscarriage of justice" standard for finding plain error. See *United States* v. *Silverstein*, 732 F.2d at 1349.

[30] On the issue of prejudice, the decision below also conflicts with *United States* v. *Silverstein*, 732 F.2d at 1348-1349 (defendant's absence from courtroom while the trial court formulated a response to a query from the jury not reversible error because defense counsel was present, no objection was made, and the outcome of the trial was not likely affected). *Silverstein* differs from the instant case in that the proceeding from which the defendants were absent was a conference between trial court and counsel on an issue of law. Such conferences are expressly permitted to be held in the absence of the defendant under Fed. R. Crim. P. 43(c)(3), and the convictions in *Silverstein* could have been affirmed on that ground.

time when it could be accommodated. This Court recently summarily reversed a Ninth Circuit decision that opened the gate to reversals on the basis of the right to be present, without regard to whether the supposed violations were prejudicial to the defense. *Rushen* v. *Spain*, *supra*. The instant decision, from the same court of appeals, is in a similar vein, but with potentially more far-reaching consequences.[31]

It was in precisely the same context of a supposed infringement on the right to be present that this Court stated in *Snyder* v. *Massachusetts*, 291 U.S. at 122:

> There is danger that the criminal law will be brought into contempt—that discredit will even touch the great immunities assured by the Fourteenth Amendment—if gossamer possibilities of prejudice to a defendant are to nullify a sentence pronounced by a court of competent jurisdiction in obedience to * * * law, and set the guilty free.

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[31] In *Rushen*, the only issue was whether an assumed violation of the right to be present at trial was subject to a "harmless error" analysis. Here, the question is whether criminal defendants will be permitted to remain silent at trial, and then obtain reversal of convictions on the basis of insubstantial claims of prejudice. The disruptive effect of the decision below could be significant.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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OCTOBER 1984

APPENDIX A

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

Nos. 82-1289, 82-1310, 82-1311 and 82-1350

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

ROBERT PAUL GAGNON, PEDRO VALENZUELA,
DONALD P. STORMS, GLENN E. MARTIN,
DEFENDANTS-APPELLANTS

Argued and Submitted April 12, 1983

Decided Dec. 8, 1983

Appeal from the United States District Court
for the District of Arizona

Before WISDOM,* SKOPIL and FERGUSON, Circuit Judges.

FERGUSON, Circuit Judge:

Defendants were convicted after a jury trial of conspiracy to possess cocaine with intent to distribute

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* Hon. John Minor Wisdom, Senior United Circuit Judge for the Fifth Circuit, sitting by designation.

and related felony drug offenses. They appeal on numerous grounds, most of which are disposed of by memorandum decision of this date. We deal here only with the contention that the trial court committed reversible error by questioning a juror during the course of the trial outside the presence of any of the defendants. We agree and reverse the convictions.

FACTS

On the first day of trial, one of the jurors noticed defendant Gagnon sketching portraits of jury members. Juror Garold Graham became alarmed and informed the bailiff, who in turn informed the judge. Out of the presence of the jury, the judge told Gagnon that it was "very improper for a defendant to draw pictures of a jury while they are sitting in the box." She confiscated the sketches and ordered Gagnon to refrain from any further drawing.

Counsel for Gagnon asked the court to determine which juror had noticed the sketching and to arrange for questioning of that juror. The judge met with Graham in the presence of Gagnon's attorney, Robert Wolkin, in her chambers. None of the defendants were present, nor were counsel for the government or for the other defendants. The following took place:

> THE COURT: Let the record show that we are meeting in chambers. Mr. Wolkin is present.
>
> For the record, would you give us your name.
>
> MR. GRAHAM: Garold Graham.
>
> THE COURT: Mr. Graham, the bailiff gave me your note. As you know, Mr. Wolkin is Mr. Gagnon's attorney; the man who was sketching in the courtroom.

> MR. GRAHAM: Yes.
>
> THE COURT: Mr. Gagnon is an artist. It was just one of those things that happened. The Court has stopped it. It won't continue.
>
> However, if because of this you feel like you couldn't be—you know—that that would affect you in any way, then I want you to tell us about it.
>
> MR. GRAHAM: As far as any judgment on what's going on, it doesn't affect me. I just thought that perhaps because of the seriousness of the trial, and because of—whichever way the deliberations go, it kind of—it upset me, because —of what could happen afterwards.
>
> THE COURT: Well, do you feel that it upset you to the extent that you couldn't judge Mr. Gagnon fairly—
>
> MR. GRAHAM: No.
>
> THE COURT: —as you would all the others?
>
> MR. GRAHAM: No.
>
> THE COURT: You could be fair to everyone concerned; you're sure of that?
>
> MR. GRAHAM: Yes.
>
> THE COURT: Because if you don't think you could, now is the time to tell us about it.
>
> MR. GRAHAM: I can be fair.
>
> THE COURT: I'm glad you brought it to our attention. I didn't notice it, and counsel didn't—
>
> MR. GRAHAM: I noticed him looking at certain people, and I noticed him looking at me one particular time there; and I didn't know what was going on, until just before the recess. He had pulled his paper up there, and I could

see him drawing portraits. And one of the other gentlemen in there had mentioned that he had also seen something of him doing—some sketching, but he didn't know what it was.

THE COURT: Has anybody else mentioned it?

MR. GRAHAM: No.

THE COURT: Does that satisfy you?

MR. WOLKIN: I'm just wondering about the conversation between the juror and the bailiff; whether that was said in front of the jury or not.

MR. GRAHAM: No. I talked with the bailiff in the hallway, after everyone had gotten in.

THE COURT: So nobody else heard you say anything about this?

MR. GRAHAM: No.

THE COURT: Well, we have the pictures. It won't continue. And we'll just go ahead as we are.

If you feel safe, secure—

MR. GRAHAM: Right.

THE COURT: You would feel comfortable in continuing serving as a juror?

MR. GRAHAM: I feel comfortable.

MR. WOLKIN: This wouldn't prejudice you in any way against Mr. Gagnon?

MR. GRAHAM: No.

THE COURT: Because, of course, it was just inadvertence—as an artist, I guess—he just did it.

Okay. Thank you very much. I would ask you not to bring this up with the other jurors, if you would please.

MR. GRAHAM: Okay.

THE COURT: I mean, don't say anything about the pictures, or about anything else that has transpired here.

MR. GRAHAM: Yes, ma'am.

THE COURT: But I can assure you that the pictures are here, and that there won't be anymore.

MR. GRAHAM: Thank you.

THE COURT: Okay. Is that agreeable with you?

MR. WOLKIN: Yes.

THE COURT: Very well.

(RT 189-192).

A transcript of the *in camera* proceeding was available to all of the parties, and no defendant objected to the proceeding during the trial. On appeal, however, all four defendants allege that this proceeding violated their sixth amendment right to an impartial jury and their statutory right to be present at every stage of their trial.

We have not considered whether the effect of this incident violated the defendants' right to an impartial jury as we have not found that one or more jurors was actually biased against any of the defendants. However, because the defendants' right to be present at all stages of the trial was violated, that violation may have operated to allow a biased member to remain on the jury.

ANALYSIS:

I. *The Right of Presence*

The right of a criminal defendant to be present at every stage of his trial has been variously character-

ized as guaranteed by the due process clause of the fifth (and, in state cases, the fourteenth) amendment, the confrontation clause of the sixth amendment, or some combination thereof. *See, e.g., Illinois v. Allen*, 397 U.S. 337, 338, 90 S.Ct. 1057, 1058, 25 L.Ed.2d 353 (1970) (confrontation clause); *Snyder v. Massachusetts*, 291 U.S. 97, 108-08, 54 S.Ct. 330, 332-33, 78 L.Ed. 674 (1934) (due process); *Bustamante v. Eyman*, 456 F.2d 269, 273 (9th Cir. 1972) (confrontation clause and due process). The precise source of the right often depends on the context in which the alleged violation occurred. *See Shields v. United States*, 273 U.S. 583, 588, 47 S.Ct. 478, 479, 71 L.Ed. 787 (1927) ("rule of orderly conduct of jury trial"). Regardless of its source, the right itself has been recognized throughout the development of American criminal jurisprudence. "A leading principle that pervades the entire law of criminal procedure is that, after indictment found, nothing shall be done in the absence of the prisoner." *Lewis v. United States*, 146 U.S. 370, 372, 13 S.Ct. 136, 137, 36 L.Ed. 1011 (1892).

However, "it has seldom been necessary to plumb the federal constitutional depths of the principle," *Bustamante*, 456 F.2d at 273, because most jurisdictions recognize the principle through statute or rule. In federal criminal trials, the right is codified in Fed. R. Crim. P. 43. With a few specific exceptions not relevant here, Rule 43 requires the presence of the defendant "at every stage of the trial including the impaneling of the jury and the return of the verdict."

The constitution, principles of jury trial, and Rule 43 all guarantee a defendant the right to be present during communications between the judge and the

jury. *Rogers v. United States*, 422 U.S. 35, 39, 95 S.Ct. 2091, 2094, 45 L.Ed.2d 1 (1975) (Rule 43 and prior decisions); *Shields*, 273 U.S. at 588-89, 47 S.Ct. at 479 (orderly conduct of jury trial); *Bustamante*, 456 F.2d at 273 (constitutional right). However that guarantee is not absolute. The defendant's presence is not required in those situations where his presence would be useless, or the benefit but a shadow. *Snyder v. Massachusetts*, 291 U.S. at 108, 54 S.Ct. at 333 (no constitutional right to accompany the jury on a view because the defendant's absence could have no effect); *see also Faretta v. California*, 422 U.S. 806, 819 n. 15, 95 S.Ct. 2525, 2533 n. 15, 45 L.Ed.2d 562 (1975).

Generally, the absence of a defendant from an *in camera* conference between a juror and the court where the court seeks to determine the juror's bias is held to be harmless error either because the conference dealt with an issue of law and was thus exempt under Fed. R. Crim. P. 43(c) or because the defendant's rights were fully protected by counsel.

In *United States v. Polizzi*, 500 F.2d 856 (9th Cir. 1974), the possibility of juror bias against the defendant arose from newspaper publicity about the case printed during trial. The court found:

> When the possibility of prejudice from publicity arises during trial, the trial court has "the affirmative duty . . . to take positive action to ascertain the existence of improper influences on the jurors' deliberative qualifications and to take whatever steps are necessary to diminish or eradicate such improprieties." *Silverthorne v. United States*, 400 F.2d 627, 643 (9th Cir. 1978) [other citations omitted]. The better practice, if

> there is a clear chance of prejudice, is for the court to interrogate each juror *in camera* about the possibly prejudicial publicity.

Id. at 880. However, the issue is not as simple in the instant case. The potential bias here did not arise from *outside* sources such as newspaper reports with which the defendant had no connection. Rather it arose through the in-court activities of the defendant which not only took place in the presence of the jury, but directly involved the jury. The government relies upon this reasoning to argue that the presence of defendants Valenzuela, Storms and Martin, who were not even represented by counsel at the *in camera* proceeding, was unnecessary as only defendant Gagnon was involved.

However, in a conspiracy case the evidence presented must link the defendants together in order to establish concert of action. A co-conspirator is vicariously liable for the acts of another co-conspirator even though he may not have directly participated in those acts, his role in the crime was minor, or the evidence against a co-defendant more damaging. *United States v. Saavedra*, 684 F.2d 1293, 13001-01 (9th Cir. 1982), *citing United States v. Basey*, 613 F.2d 198, 202 (9th Cir. 1979), *cert. denied*, 446 U.S. 919, 100 S.Ct. 1854, 64 L.Ed.2d 274 (1980). Therefore, since the evidence against one defendant may be used against another, it is not unreasonable to fear that the prejudice against one may be extended to the others, especially under the facts of this case, where juror Graham apparently felt concern about the possibility of future retaliation. Therefore, we cannot say that Gagnon's co-defendants had no stake in the determination of whether Graham could con-

tinue to be impartial, nor can we say that Gagnon's counsel could effectively safeguard their interests.

As to defendant Gagnon, although his attorney proclaimed himself satisfied with Graham's statements, the juror did indicate that another juror had also noticed Gagnon's activities. Had Gagnon been present, he could have gauged the possibility of whether, given the distance and angle of the second juror's seating relative to himself, that second juror might have seen or guessed the subject of the pencil sketches.

Even if we were convinced that the presence of some or all of the defendants would have been but a "shadow" of benefit to them, so as to foreclose their due process right to attend the proceeding under *Snyder*, this circuit has stated that the protection offered by Rule 43 "is broader than the sixth amendment right to confrontation and the fifth amendment due process rights." *United States v. Christopher*, 700 F.2d 1253, 1261-62 (9th Cir. 1983); *accord United States v. Turner*, 532 F.Supp. 913, 916 (D.C. Cal. 1982).

II. *Waiver*

Rule 43 does, of course, make provision for the absence of a defendant without written consent in certain situations. Under subsection (c), no written consent is required for a corporation to appear by counsel, or for a defendant to be absent during discussion of a question of law or at a reduction of sentence. *United States v. Veatch*, 674 F.2d 1217, 1225-26 (9th Cir. 1981). These situations are not applicable here. Rule 43(b) also provides that "the defendant shall be considered to have waived his right to be present" when he:

> (1) voluntarily absents himself after the trial has commenced (whether or not he has been informed by the court of his obligation to remain during the trial), or (2) after being warned by the court that disruptive conduct will cause him to be removed from the courtroom, persists in conduct which is such as to justify his being excluded from the courtroom.

There is no contention that Gagnon's behavior was disruptive within the meaning of Rule 43(b)(2), and the behavior of the other defendants was not even an issue in the *in camera* proceeding. Thus the question posed is whether Gagnon and/or the other defendants waived their right to be present by voluntarily absenting themselves.

As in *United States v. Ford*, 632 F.2d 1354, 1379 (9th Cir. 1980), "[a]lthough the record suggests that [the defendant]'s absence was voluntary, we cannot conclusively determine that it was." (Footnote omitted). The record shows that the district judge announced in open court her intention to question juror Graham in chambers, but does not disclose how it came about that only Mr. Wolkin (Gagnon's attorney) attended the conference.[1] There is no indication of whether Gagnon or the other defendants expressly or impliedly indicated their willingness to be absent from the conference. It is true that none of the defendants objected to the *in camera* proceeding during the remainder or at the close of trial, but under our analysis in *Ford*, that fact is relevant only to the

[1] At oral argument on appeal, Wolkin stated that he was invited to the conference through a note from the judge delivered by the bailiff.

question of resulting prejudice, not to the question of voluntary absence. 632 F.2d at 1379.[2]

The standard for determining whether a criminal defendant has waived a constitutional right is even more stringent than that provided by Rule 43(b), requiring "an intentional relinquishment or abandonment of a known right or privilege." *Johnson v. Zerbst*, 304 U.S. 458, 464, 58 S.Ct. 1019, 1023, 82 L.Ed. 1461 (1958). Since we are unable to conclude that defendants voluntarily absented themselves within the meaning of Rule 43(b), *a fortiorari* we cannot conclude that they knowingly and intelligently waived their constitutional right to be present.

[2] The government argues that because none of the defendants objected to the *in camera* proceeding during the trial, they may not raise the issue on appeal. The short answer to that contention is that "[p]lain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." Fed. R. Crim. P. 52(b). A criminal defendant's right to be present at every stage of his trial is so fundamental that, in certain circumstances, its violation must be noticed by a reviewing court regardless of a failure to raise the issue below. *Rogers v. United States*, 422 U.S. 35, 41, 95 S.Ct. 2091, 2095, 45 L.Ed.2d 1 (1975) (violation of Rule 43 raised by Supreme Court *sua sponte*). We are aware of our holding in *Polizzi v. United States*, 550 F.2d 1133, 1137 (9th Cir. 1976), that an objection to the defendants' absence need not be considered on a motion for relief under 28 U.S.C. § 2255 (the federal counterpart of habeas corpus) when the objection was not raised either during the trial or on appeal of the conviction. Such a holding neither prevents a court from noticing the objection, nor addresses the situation of a defendant who does raise the objection on apeal. We note also that such an issue was considered on appeal in *United States v. Ford*, 652 F.2d at 1378-79, despite a failure to raise it before the trial court.

III. *Harmless Error Rule*

Although we have determined that defendants' constitutional and statutory rights were violated by an examination of a potentially biased juror in their absence, we must make one further inquiry. With a few notable exceptions, the violation of a constitutional right does not require reversal if the violation was harmless beyond a reasonable doubt. *Chapman v. California*, 386 U.S. 18, 21-22, 87 S.Ct. 824, 826-827, 17 L.Ed.2d 705 (1967). The government must "prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Id.* at 24, 87 S.Ct. at 828. The burden is on the government to establish this. *Id.* at 24-26, 87 S.Ct. at 828-829. And Rule 43 must be read in conjunction with Rule 52(a), which provides that "[a]ny error, defect, irregularity or variance which does not affect substantial rights shall be disregarded." This circuit stated in *United States v. Ford*, 632 F.2d at 1379 n.28:

> *Akins v. Cardwell*, 500 F.2d 47, 47 (9th Cir. 1974) (per curiam), suggests that a presumption of prejudice arises when any portion of trial occurs during a defendant's or his counsel's absence, and that the government must clearly rebut that presumption. However, our more recent cases do not follow the *Akins* presumption. In *United States v. Cassasa*, 588 F.2d 282 (9th Cir. 1978), *cert. denied*, 441 U.S. 909, 99 S.Ct. 2003, 60 L.Ed.2d 379 (1979), for example, we responded to the defendant's presumption of prejudice argument by stating that: "[c]ounsel's absence during judge-jury communication is harmless error if no reasonable possibility of prejudice could result." *Id.* at 285. Thus, the government bears the burden of proving that the defendant's absence was harmless only if the absence presents a reasonable possibility of prejudice. For reasons set forth in the text, we conclude that no reasonable possibility of prejudice to Armstrong arises from the reading of the Scannell testimony in his absence.

We need not resolve this apparent conflict in precedent. We have stated in Part I, *supra*, that a reasonable possibility of prejudice arose with regard to all defendants, and thus under either the *Akins* or *Ford* test, the burden in this case must rest on the government.

Whether the government must prove that a violation of Rule 43 is harmless beyond a reasonable doubt or to some lesser degree of certainty has not been specifically addressed in this circuit. *Cf. United States v. Reynolds*, 489 F.2d 4 (6th Cir. 1973), *cert. denied*, 416 U.S. 988, 94 S.Ct. 2395, 40 L.Ed.2d 766 (1974) (error reversible if any reasonable possibility of prejudice); *United States v. Freed*, 460 F.2d 75 (10th Cir. 1972) (standard is clear prejudice). Few of our cases have had reason to explore that area of the Rule 43 presence right that is outside constitutional protection. Given our prior finding that the defendants' due process rights were violated by proceeding in their absence without determining whether the absence was voluntary, we need only assess the prejudice in this case under a "harmless beyond a reasonable doubt" standard.

We cannot find the error here to be harmless beyond a reasonable doubt. The presence of the defendants was necessary in order to safeguard another constitutional right—the right to an impartial jury. While we cannot say on this record that the right to

an impartial jury was infringed, we also cannot say with assurance that the absence was harmless.

The district court is REVERSED.

SKOPIL, Circuit Judge, dissenting:

I agree that the district court erred in examining the juror without all defendants present. I also agree that we must reverse unless the government is able to prove beyond a reasonable doubt that this error did not contribute to the verdicts. I believe, however, that the government met its burden here.

Prior to examining the juror in-chambers in the presence of defense attorney Wolkin, the judge stated in open court her intention to conduct the examination. Despite being aware that the court recessed for the specific reason of examining the juror, none of appellants' counsel objected to it being conducted in their absence. Their failure to object is to be considered when determining whether the error was harmless. *United States v. Ford*, 632 F.2d 1354, 1379 (9th Cir. 1980); *United States v. Walls*, 577 F.2d 690, 698 (9th Cir.), *cert. denied*, 439 U.S. 893, 99 S.Ct. 251, 58 L.Ed.2d 239 (1978).

Appellants' attorneys not only failed to object to the examination, but attorney Wolkin was present to guard against any irregularities. *Ford*, 632 F.2d at 1379; *United States v. Friedman*, 593 F.2d 109, 121 (9th Cir. 1979). Defendants charged with conspiracy have similar interests. Attorney Wolkin exercised his opportunity to question the juror directly and came away satisfied of his impartiality. At the end of the examination, he expressed his agreement with the court's conclusion not to remove the juror. It is difficult to conceive of any value from the presence of defendants and the remaining defense attorneys.

Their questions would have been mere surplusage to those posed by attorney Wolkin and the court.

The examination at issue was made part of the official record. In *Spain v. Rushen*, 543 F. Supp. 757, 770 (N.D.Cal. 1982), *aff'd without opinion*, 701 F.2d 186 (9th Cir. 1983), no record was made of the conversations between judge and juror. This private nature prevented any error from being "readily apparent on the record." Here, no objection was registered by defendants over the subject matter or the conduct of the examination. Review of the record suggests why defendants did not object.

After assuring the juror that the drawing by Mr. Gagnon would cease, the court asked the juror whether he was upset to the extent that he could not judge Mr. Gagnon and the others fairly. The juror responded negatively. The court then posed other similar questions. The juror indicated that he would continue to be impartial. Attorney Wolkin's question elicited the same response. Upon terminating the examination the court properly instructed the juror to not discuss the matter with other jurors. *Id.* at 767.

The examination of the juror in the absence of all but one defense attorney was harmless error. The added presence of the defendants and their counsel would have been superfluous and quite possibly detrimental to their interest. *Polizzi v. United States*, 550 F.2d 1133, 1137 (9th Cir. 1976). The district court clearly did not abuse its discretion in determining that the juror would remain impartial. *United States v. Perez*, 658 F.2d 654, 663 (9th Cir. 1981). The court and attorney Wolkin were aware of the potentially damaging influence and their questions were directed to that end. The juror consistently responded that he would remain fair and impartial. More specific questioning was unnecessary.

I would affirm.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 82-1289
82-1310
82-1311
82-1350

DC No. CR 81-205-MAR
Arizona

UNITED STATES OF AMERICA, APPELLEE

v.

ROBERT PAUL GAGNON, PEDRO VALENZUELA,
DONALD P. STORMS, GLENN E. MARTIN, APPELLANTS

[Filed Aug. 29, 1984]

ORDER

Before: WISDOM,* SKOPIL and FERGUSON, Circuit Judges.

A majority of the members of the panel that decided this case, Judges Wisdom and Ferguson, has voted to deny the petition for rehearing. Judge Skopil has voted to grant the petition for rehearing. Judges Skopil and Ferguson have voted to reject the

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* Hon. John Minor Wisdom, Senior United [States] Circuit Judge for the Fifth Circuit, sitting by designation.

suggestion for a rehearing en banc; Judge Wisdom makes no recommendation.

The full court has been advised of the suggestion for en banc hearing and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35.

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

* * * * *

APPENDIX C

[187] THE COURT: I guess we better bring this up in court. One of the jurors indicated t/ Mr. Sholder that he was—they were concerned—and I don't know which one—that Mr. Gagnon—excuse the pronunciation—was drawing pictures of the jury.

MR. WOLKIN: Your Honor, I have—I was just handed a note. And I'm just wondering whether this note should be made part of the record or not. Did this come from one of the jurors? Or the bailiff?

MR. SHOLDER: No. What happened, one of the jurors told me that he felt—your client was drawing pictures of the jury, and he seemed worried about it.

MR. WOLKIN: Yes. And I would like to—

THE COURT: Well, are you drawing pictures of the jury?

MR. WOLKIN: Yes, your Honor, he is; and, good ones, actually.

[188] THE COURT: Well, that is very improper—

MR. WOLKIN: Okay.

THE COURT: —for a defendant to draw pictures of a jury while they're sitting in the box. I don't even allow the press without permission. I think it is very inappropriate, and I'll ask you not to do it anymore; and to turn over the pictures that you've drawn to the Court, please.

MR. WOLKIN: Well, wait a minute. Your Honor, I don't think I had an answer to my question as to—did you write this?

MR. SHOLDER: Yes.

THE COURT: Yes, he wrote it.

MR. WOLKIN: Oh, okay.

THE COURT: This was by word of mouth.

MR. WOLKIN: Okay.

THE COURT: So the record may show—you can read the note into the record, if you wish.

MR. WOLKIN: Well, I have two quick things. Well, the note from the bailiff says, "One of the jurors said Mr. Gagnon was drawing portraits of the jurors, and seemed concerned about it."

Your Honor, I don't know what the nature of the concern would be, and I would ask the Court at this time to find out which juror it is, and—and perhaps the Court [189] ought to direct some questions to that juror and find out whether the concern that is being expressed, whether it might be in the nature of prejudice against Mr. Gagnon. I don't know whether—

THE COURT: Well, I can't imagine you as an attorney having your defendant sit there and draw pictures of the jury. In my wildest, I can't imagine that.

Do you know which juror it was?

MR. SHOLDER: Yes, ma'am.

MR. WOLKIN: Your Honor, I—

THE COURT: I will talk to the juror in my chambers, and make a determination.

We'll stand at recess.

(Thereupon, a brief recess was taken; and the following proceedings were held in chambers:)

THE COURT: Let the record show that we are meeting in chambers. Mr. Wolkin is present.

For the record, would you give us your name.

MR. GRAHAM: Garold Graham.

THE COURT: Mr. Graham, the bailiff gave me your note. As you know, Mr. Wolkin is Mr. Gagnon's attorney; the man who was sketching in the courtroom.

MR. GRAHAM: Yes.

THE COURT: Mr. Gagnon is an artist. It was just one of those things that happened. The Court has [190] stopped it. It won't continue.

However, if because of this you feel like you couldn't be—you know—that that would affect you in any way, then I want you to tell us about it.

MR. GRAHAM: As far as any judgment on what's going on, it doesn't affect me. I just thought that perhaps because of the seriousness of the trial, and because of—whichever way the deliberations go, it kind of—it upset me, because—of what could happen afterwards.

THE COURT: Well, do you feel that it upset you to the extent that you couldn't judge Mr. Gagnon fairly—

MR. GRAHAM: No.

THE COURT: —as you would all the others?

MR. GRAHAM: No.

THE COURT: You could be fair to everyone concerned; you're sure of that?

MR. GRAHAM: Yes.

THE COURT: Because if you don't think you could, now is the time to tell us about it.

MR. GRAHAM: I can be fair.

THE COURT: I'm glad you brought it to our attention. I didn't notice it, and counsel didn't—

MR. GRAHAM: I noticed him looking at certain people, and I noticed him looking at me one particular [191] time there; and I didn't know what was going on, until just before the recess. He had pulled his paper up there, and I could see him drawing portraits. And one of the other gentlemen in there had mentioned that he had also seen something of him doing—some sketching, but he didn't know what it was.

THE COURT: Has anybody else mentioned it?

MR. GRAHAM: No.

THE COURT: Does that satisfy you?

MR. WOLKIN: I'm just wondering about the conversation between the juror and the bailiff; whether that was said in front of the jury or not.

MR. GRAHAM: No. I talked with the bailiff in the hallway, after everyone had gotten in.

THE COURT: So nobody else heard you say anything about this?

MR. GRAHAM: No.

THE COURT: Well, we have the pictures. It won't continue. And we'll just go head as we are.

If you feel safe, secure—

MR. GRAHAM: Right.

THE COURT: You would feel comfortable in continuing serving as a juror?

MR. GRAHAM: I feel comfortable.

MR. WOLKIN: This wouldn't prejudice you in any [192] way against Mr. Gagnon?

MR. GRAHAM: No.

THE COURT: Because, of course, it was just inadvertence—as an artist, I guess—he just did it.

Okay. Thank you very much. I would ask you not to bring this up with the other jurors, if you would, please.

MR. GRAHAM: Okay.

THE COURT: I mean, don't say anything about the pictures, or about anything else that has transpired here.

MR. GRAHAM: Yes, ma'am.

THE COURT: But I can assure you that the pictures are here, and that there won't be anymore.

MR. GRAHAM: Thank you.

THE COURT: Okay. Is that agreeable with you?

MR. WOLKIN: Yes.

THE COURT: Very well.

(Thereupon, a brief recess was taken; court and counsel reconvened in the courtroom; the jury being present, the proceedings were resumed as follows:)

THE COURT: The record may show the jury's present, counsel, defendants.

You may proceed with your direct examination.

DIRECT EXAMINATION (Resumed)

* * * * *

APPENDIX D

1. Rule 43, Fed. R. Crim. P., provides:

> **(a) Presence Required.** The defendant shall be present at the arraignment, at the time of the plea, at every stage of the trial including the impaneling of the jury and the return of the verdict, and at the imposition of sentence, except as otherwise provided by this rule.
>
> **(b) Continued Presence Not Required.** The further progress of the trial to and including the return of the verdict shall not be prevented and the defendant shall be considered to have waived his right to be present whenever a defendant, initially present,
>
> (1) voluntarily absents himself after the trial has commenced (whether or not he has been informed by the court of his obligation to remain during the trial), or
>
> (2) after being warned by the court that disruptive conduct will cause him to be removed from the courtroom, persists in conduct which is such as to justify his being excluded from the courtroom.
>
> **(c) Presence Not Required.** A defendant need not be present in the following situations:
>
> (1) A corporation may appear by counsel for all purposes.
>
> (2) In prosecutions for offenses punishable by fine or by imprisonment for not more than one year or both, the court, with the written consent of the defendant, may permit arraignment, plea, trial, and imposition of sentence in the defendant's absence.

(3) At a conference or argument upon a question of law.

(4) At a reduction of sentence under Rule 35.

2. Rule 52, Fed. R. Crim. P., provides:

(a) Harmless Error. Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.

(b) Plain Error. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

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